85-1741

No.

Supreme Court, U.S.
FILED
APR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN MINING CONGRESS,
AMAX INC.,
ASARCO INCORPORATED,
ST. JOE MINERALS CORPORATION,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JAMES R. WALPOLE*
EDMUND E. HARVEY
JOANNE M. SALVATORE

CHADBOURNE & PARKE
1101 Vermont Ave., N.W.
Suite 900
Washington, D.C. 20005
(202) 289-3000

Of Counsel:

DOUGLAS E. MCALLISTER
AMERICAN MINING CONGRESS
1920 N Street, N.W.
Washington, D.C. 20036
(202) 861-2800

ROBERT A. EMMETT
REED SMITH SHAW & MCCLAY
1150 Conn. Ave., N.W.
Washington, D.C. 20036
(202) 457-6100

Attorneys for Petitioners
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether national standards promulgated by the Environmental Protection Agency under the Clean Water Act are invalid because the Agency failed to provide notice and an additional opportunity to comment, pursuant to section 4 of the Administrative Procedure Act, on substantive changes made to its proposed regulations.

PARTIES TO THE PROCEEDING[1]

Petitioner American Mining Congress is a national trade association whose members produce most of the nation's metals, coal, uranium, and other mineral products. Petitioners AMAX Inc.,[2] ASARCO Incorporated[3] and St. Joe Minerals Corporation[4] are major U.S. producers of metals, including primary lead, zinc and copper.

---

[1] In the court below, the following were also parties: Kennecott, GTE Products Corporation, Secondary Lead Smelters Association, Gulf Coast Lead Company, Inc., and Mallinckrodt, Inc.

[2] Petitioner AMAX Inc. has the following affiliated companies: Alumax Inc. and Canada Tungsten Mining Corporation, Ltd.

[3] Petitioner ASARCO Incorporated has the following non-wholly owned subsidiaries or other associated companies: Alta Mining and Development Company, Blackhawk Mining and Developing Company, Limited, Compania Miners Quioma S.A., Federated Genco Limited, Fry's Metals, Inc., Geominerals, Ltd., Government Gulch Mining Company Ltd., Green Hill Cleveland Mining Company, Liard River Mining Company Ltd., Mexico Desarrollo Industrial Minero, S.A., M.I.M. Holdings Limited, Empress Miners Beranguela S.A., Empress Miners Cerro Grande S.A., Midetco Ltd., Lesarco, Inc., Neptune Mining Company, Corporacion Miners Nor Peru, S.A., Southern Peru Copper Corporation, Wyoming Mining and Milling Company Ltd.

[4] Petitioner St. Joe Minerals Corporation is a wholly owned subsidiary of Fluor Corporation. The following are non-wholly owned subsidiaries or affiliates of St. Joe Minerals Corporation: B & W Micronutrients, Inc., St. Joe Gold Corporation, Massey Coal Company (partnership between subsidiaries of St. Joe Minerals Corporation and Shell Oil Company), and Yuba Placer Gold Company (joint venture between a subsidiary of St. Joe Minerals Corporation and Yuba Natural Resources, Inc.).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
Rulemaking Proceeding	3
Participation in Rulemaking	5
Decision Below	7
REASONS FOR GRANTING THE WRIT	9
I. This Case Presents Important Questions Of Federal Administrative and Environmental Law	9
A. The Fourth Circuit Misinterpreted the Notice Requirements of the Administrative Procedure Act	10
B. The Fourth Circuit Misinterpreted the "Logical Outgrowth" Rule	14
II. The Decision Below Creates A Conflict Among The Circuits	16
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

American Federation of Labor and Congress of Industrial Organizations v. Donovan, 757 F.2d 330 (D.C. Cir. 1985) 17

American Frozen Food Institute v. Train, 539 F.2d 107 (D.C. Cir. 1976) 12

American Iron and Steel Institute v. EPA, 568 F.2d 284 (3d Cir. 1977) 13

American Paper Institute v. EPA, 660 F.2d 954 (4th Cir. 1981) 13

Appalachian Power Co. v. EPA, 579 F.2d 846 (4th Cir. 1978) 13

BASF Wyandotte Corp. v. Costl 598 F.2d 637 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980) 11

Chocolate Manufacturers Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985) 11, 14, 17, 18

Eli Lilly & Co. v. Costle, 444 U.S. 1096 (1980) 10

Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977) 11

National Association of Home Health Agencies v. Schweiker, 690 F.2d 932 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983) 11

National Tour Brokers Ass'n v. United States, 591 F.2d 896 (D.C. Cir. 1978) 10

PPG Industries, Inc. v. Costle, 659 F.2d 1239 (D.C. Cir. 1981) 12

Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983) 11, 14, 17

Taylor Diving & Salvage Co., Inc. v. Dept. of Labor, 599 F.2d 622 (5th Cir. 1979) 14

Wagner Electric Corp. v. Volpe, 466 F.2d 1013 (3d Cir. 1972) 14

Table of Authorities Continued

	Page
Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978)	17
STATUTES:	
Administrative Procedure Act of 1946, Pub. L. No. 89-554, 80 Stat. 383, 5 U.S.C. §§551, *et seq.* (1966)	2
Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1567, 33 U.S.C. §§ 1251-1376, as amended by Municipal Wastewater Treatment Construction Grant Amendments of 1981, Pub. L. No. 97-117, 95 Stat. 1623 (1981)	2
5 U.S.C. § 553 (1966)	2, 9
5 U.S.C. § 553(b)(3) (1966)	10
28 U.S.C. § 1254(1) (1980)	2
33 U.S.C. § 1314 (1981)	3
33 U.S.C. § 1314(b)(2)(A) (1981)	4, 7
33 U.S.C. § 1369(b) (1973)	3
RULES AND REGULATIONS:	
48 Fed. Reg. 7073 (February 17, 1983)	4
49 Fed. Reg. 8760 (March 8, 1984)	7
40 C.F.R. § 421 (1985)	2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN MINING CONGRESS, AMAX INC., ASARCO INCORPORATED, AND ST. JOE MINERALS CORPORATION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners American Mining Congress, AMAX Inc., ASARCO Incorporated, and St. Joe Minerals Corporation ("Petitioners") pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered on December 26, 1985.

OPINION BELOW

The opinion of the court of appeals below is reported at 780 F.2d 445. It is reproduced in Appendix A.

JURISDICTION

The opinion of the court of appeals was issued December 26, 1985. The Order denying rehearing and rehearing *en banc* was issued on January 24, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 4 of the Administrative Procedure Act of 1946, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 553) is reprinted in App. H. Relevant portions of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1567 (1977) (codified as amended at 33 U.S.C. §§ 1251-1376 (1981), at issue here, are reprinted in App. I.

STATEMENT OF THE CASE

This case presents an issue of great and recurring importance under a major Federal environmental law and the governing procedures of the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* ("APA"). The case arises out of petitions to review national standards (known as effluent limitations guidelines) set by the Environmental Protection Agency ("EPA" or "Agency") for portions of the U.S. metals industry in a rulemaking proceeding under the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1981); 40 C.F.R. § 421. In proposing the limitations EPA sought comment on certain specific technologies for the control of water pollution effluents. Comments by Petitioners demonstrated to the Agency that such technologies could not achieve the proposed limitations. EPA thereupon decided to adopt and promulgate a substantially dif-

ferent technology—one, of which the Petitioners and public had not been placed on notice, and that had not been the subject of any comments.

Petitioners challenged the regulations[1] pursuant to 33 U.S.C. § 1369(b), and the Fourth Circuit upheld EPA's action. It succumbed to the temptation to defer to the Agency's claimed expertise, and failed to hold the Agency to the notice and fairness requirements of the APA. Since EPA's adopted technology had never been exposed to comment because of lack of notice, the court below had an inadequate record and was in no position to determine whether the rule was the product of an informed and reasoned judgment.

Petitioners are major lead, zinc and copper producers in the United States, and a national trade association. Their operations are deeply affected by federal environmental laws and regulations, including the Clean Water Act requirements at issue.

Rulemaking Proceeding

On February 17, 1983, EPA, pursuant to section 304 of the Clean Water Act, 33 U.S.C. § 1314, proposed twelve sets of nationally applicable effluent guideline regulations for "Nonferrous Metals Manufacturing." Regulations were proposed, *inter alia*, for the U.S. lead, zinc and copper industries.

The Clean Water Act requires the national effluent guideline regulations to "identify . . . the degree of effluent reduction attainable through the application

---

[1] Petitioners challenged four of the twelve sets of regulations issued by EPA: 40 C.F.R. Part 421, Subparts E, G, H and I. Other industries challenged different regulations, and the court below consolidated all the cases over the opposition of all the petitioner-litigants. See App. 60a.

of the best control measures and practices achievable." 33 U.S.C. § 1314(b)(2)(A). In promulgating these technology-based regulations, EPA must *first* identify the best control measures and practices achievable, and *then* set the actual discharge limits based on the capability of the technology identified. The identification by the EPA of the control measure is a crucial step because the actual limits are based on the capacity of the technology selected. The control technology from one industry may be "transferred" (*i.e.*, identified) to another if the processes are similar, but EPA may choose to have different discharge limits for the two industries. Thus, the identification of the technology is a fundamental step in the rulemaking process.

In the rulemaking at issue, EPA published in the Federal Register proposed effluent limitations and specified the six pollution control technology options it was considering, and it requested specific comments on them or any other alternative technologies.[2] The six options included two waste treatment processes frequently used by Petitioners: "lime and sedimentation" (known as "lime and settle") and "lime, settle

---

[2] The 94 page proposal included a list of "in-process" systems and several "in-place" systems considered for proposal (App. 64a-67a), and then it specified the six "control and treatment options" that were selected for final consideration. App. 67a-68a. Comments were requested on these six options: "The Agency specifically requests long-term sampling data (especially paired raw wastewater—treated effluent data) from nonferrous metals manufacturing plants having well-operated treatment systems using the treatment technologies *relied upon for this regulation*, and also other equally effective treatment technologies." 48 Fed. Reg. 7073 (Feb. 17, 1983) (emphasis added). App. 69a.

and filter." The Agency regarded these as two separate and distinct treatment options.

After the publication of Notice in the Federal Register, EPA distributed to interested parties a proposed Development Document, which was not published in the Federal Register. That 3-volume document consisted of over 2100 pages, and contained, *inter alia*, general descriptions of over 25 technologies, including a process known as sulfide precipitation. Nowhere in that document was it stated or even suggested that sulfide precipitation was either being considered as an option or a supplement to one of the six stated options.

During the development of the Agency's 55,000 page administrative record ("Record") sulfide precipitation was never addressed as being an alternative or supplement to the six options, nor was it ever mentioned in *any* of the comments. Petitioners focused their attention on the options listed for consideration in the Federal Register, especially "lime and settle" and "lime, settle and filter," systems with which they were extremely familiar. They had grave concerns about the sampling and analysis data relied on by EPA which, for the most part, was from other industries. As a result they undertook a major effort to submit to EPA data developed by experienced industry professionals and consultants on the treatment capabilities of the six technologies.

Participation in Rulemaking

During the comment period, Petitioners submitted hundreds of pages of comments plus over 30,000[3]

---

[3] The court below notes the Agency relied on "only 300 raw

sampling and analysis results obtained from the industry's seven major plants, taken over the course of seven years. Petitioners also met twice with EPA representatives to discuss the data.[4] The thrust of Petitioners' comments was that the precise limits called for by the proposed regulations (that were based on data from five other industries) were impossible to meet with the six technologies. The Agency was urged to consider the comprehensive data submitted by Petitioners since it represented the actual industry being regulated.

After the close of the comment period, EPA representatives notified Petitioners that the sulfide precipitation technology was being considered since the original six options did not seem capable of achieving the discharge limits in the proposal.[5] EPA representatives stated that they were considering sulfide precipitation in addition to the "lime, settle and filter"

---

and treated data points" (App. 10a); these were obtained from other industries. The court upheld the Agency's rejection of Petitioners' comprehensive, industry-specific data.

[4] The EPA minutes of one meeting were prepared three months later, and those for the second were prepared more than two months afterwards. Record pp. 44439 and 44443.

[5] The notification that the Agency was considering a new technology occurred during a January 5, 1984 conference phone call between representatives of EPA and Petitioners, *after* the comment period had closed. The normal procedure is for the Agency to prepare a memorandum of such a phone call and include it in the Administrative Record, although the Agency made *no record* of this phone call. The only record of the conversation is in the affidavit attached to Petitioners' Reply Brief in the Fourth Circuit, to which the Agency did not object. See August 2, 1985 Court Order App. 39a, and affidavit from Reply Brief App. 40a-49a.

process. Petitioners requested an opportunity to comment on sulfide precipitation to demonstrate inadequacies of such treatment in certain circumstances. Permission to submit any comments on the new technology was denied by EPA. Since no comments were allowed, the only data on the new technology in the Record was that developed by the Agency. Petitioners could not even obtain from EPA a copy of Agency test results on the new technology until May, 1984, three months after the final regulations were published, and then only after a Freedom of Information Act request was filed. See App. 47a-49a. The final regulations were based on the new technology[6] selected internally by EPA after the close of the comment period.[7]

Decision Below

In rejecting Petitioners' challenge to EPA's regulations on the issue of adequate notice, the Fourth Circuit held that Petitioners' "should reasonably have known that EPA was considering sulfide precipitation." App. 15a. While the court acknowledged that

---

[6] See *e.g.* the notice in the final regulations: "The Agency has amended the proposed BAT technology basis for primary lead plants operating acid plants to include sulfide precipitation." 49 Fed. Reg. 8760 (March 8, 1984), App. 71a.

[7] There is a serious question whether this EPA procedure of predetermining regulatory limits *prior* to selecting the model technology is in violation of § 304(b)(2)(A) of the Clean Water Act, 33 U.S.C. § 1314(b)(2)(A). The court below did not address this issue which was raised by Petitioners in their principal and reply briefs. The court below referred to the EPA proposed limits as the "established effluent guidelines." App. 14a. The limits were not established; they were proposed and still under Agency consideration, along with the technology to meet them.

sulfide precipitation was not among the EPA's listed six control and treatment options in the proposed rule, the court found that the preamble to the proposed rules "specifically asked for comments on alternative treatment technologies." App. 15a. Additionally the court found that EPA's associated Development Document "included both lime and settle and sulfide precipitation in its discussion of effective chemical precipitation methods." App. 15a.

The court below discussed the "logical outgrowth" rule and concluded that "EPA did not violate the requirements of the Administrative Procedure Act when, *in an attempt to respond to industry comments and complaints,* it added sulfide precipitation as a supplement to the Best Available Technology on which its effluent limitations were grounded." (emphasis added). App. 15a.

Throughout the court's opinion are references to deferral to Agency expertise.[8] This deference undoubtedly led the court to accept, without benefit of any comments and contrary to Petitioners' position, the Agency's contentions that sulfide precipitation was simply the addition of a second step to the "lime, settle and filter" technology, that it could be transferred to Petitioners' plants from experience gained outside the industry, and that it is a "more effective treatment than the conventional lime and settle process." App. 17a.[9] These determinations were based to-

---

[8] The court below summarily deferred to Agency expertise on a number of far-reaching technical issues raised in Petitioners' briefs. There is no explanation of the EPA bases for such conclusions.

[9] If sulfide precipitation is a more effective technology than

tally on the EPA references in the 55,000 page Record, none of which were contained, or referred to, in the Federal Register notice.

The court also denied a Motion of Petitioners to Supplement the Administrative Record. App. 55a. Insofar as sulfide precipitation was concerned, Petitioners sought to include in the Record long-term data from a foreign plant (relied upon by EPA) showing that sulfide precipitation would not achieve the prescribed limits, evidence of a meeting between representatives of EPA and the foreign plant (prior to the promulgation of the regulations) in which EPA representatives were told that EPA samplings from that plant were not representative of long-term performance, and Petitioners' estimates of the costs of sulfide precipitation which were not considered by the Agency since no comments had been allowed.

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL ADMINISTRATIVE AND ENVIRONMENTAL LAW

This case presents an issue of great importance in rulemaking proceedings conducted by the Environmental Protection Agency, and other agencies, under the Administrative Procedure Act, 5 U.S.C. § 553. It raises the question of what obligation a federal agency

---

the conventional "lime, settle and filter" process, it raises the question why sulfide precipitation was not designated in the Federal Register as an option for consideration in the originally proposed rules.

has under section 4 of the APA to give notice and opportunity for comment on a rule that differs substantially from the originally proposed rule and has been adopted in response to complaints and comments directed at the initial proposal. The question is a recurring one that, according to Justice Rehnquist, "will ultimately require interpretation of important statutory language by this Court," *Eli Lilly & Co. v. Costle*, 444 U.S. 1096, 1098 (1980), dissent in order denying certiorari.

If the decision below is allowed to stand it will have a chilling impact on the public's ability to participate meaningfully in rulemaking proceedings. The case also takes on added significance because of the prominent role informal rulemaking proceedings have in the implementation of Environmental Laws. They involve voluminous amounts of technical and scientific material with no opportunity for a hearing.

A. The Fourth Circuit Misinterpreted the Notice Requirements of the Administrative Procedure Act

Section 4 of the Administrative Procedure Act requires that the notice in the Federal Register of a proposed rulemaking contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (1966). It is well-acknowledged that this notice requirement serves to benefit both the public and the agency involved,[10] by encouraging public comment

---

[10] See *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

and testing the rules, providing a fair opportunity for all views,[11] and creating a record for judicial review.[12]

It is especially important that adequate notice be given in EPA rulemakings because of the large amount of technical data normally involved in such proceedings. It is incumbent upon EPA to identify issues and related data with "reasonable specificity" in order to avoid an "elaborate treasure hunt, in which interested parties, assisted by high-priced guides (called 'lawyers'), must search the record for the buried treasure of a possibly relevant comment."[13]

While the Fourth Circuit acknowledged the need to afford notice "sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking," citing *Chocolate Manufacturers Ass'n v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985), it erroneously interpreted what constitutes adequate notice.

The court's suggestion that Petitioners "should reasonably have known that EPA was considering sulfide precipitation" was based on two factors: (1) "EPA specifically asked for comments on alternative treat-

---

[11] See *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983), *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980), and *National Association of Home Health Agencies* v. *Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983).

[12] See *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253, 1271 n. 54 (9th Cir. 1977).

[13] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 550.

ment technologies" in the preamble to the proposed rules; and (2) EPA's associated Development Document included sulfide precipitation in its discussion of effective precipitation methods. App. 15a.

To suggest that the Agency's request for "alternative treatment technologies," and nothing more, placed Petitioners' on notice of *anything*, let alone that sulfide precipitation was under consideration, does not comport with the APA's requirement that the notice be sufficiently descriptive to give the public a fair opportunity to comment and participate in the rulemaking. And the lack of notice is exacerbated where, as here, no party in its comments even suggested such a technology. The absence of any comments on sulfide precipitation plainly emphasizes the lack of adequate notice,[14] particularly in light of the substantial comments submitted by Petitioners.

The court's reliance upon the proposed Development Document as satisfaction of the notice requirements of the APA is equally misplaced. That document was not published in the Federal Register and consisted of over 2100 pages, including a boilerplate catalog of more than twenty-five existing water treatment technologies. Sulfide precipitation was just one of the technologies discussed, and it was not identified as one of the options under consideration as a proposed model technology. The decision below would place an intolerable burden on commentators, requir-

---

[14] See *American Frozen Food Institute* v. *Train*, 539 F.2d 107, 135 (D.C. Cir. 1976) and *PPG Industries, Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) which states "the importance of the issue was belied by the obscurity of the footnote intended to give notice, (and) by the lack of meaningful comment."

ing them to address every technology discussed in a Development Document even though the Agency published a notice in the Federal Register specifying the technologies under final consideration.[15] The court relied on assertions and interpretations of data on sulfide precipitation that first appeared in the Agency's brief; they were not addressed in the rulemaking. The only "record" before the court was information EPA presented. When Petitioners attempted to address these matters, the Agency moved to strike the material from Petitioners' brief, and the court granted the motion. App. 55a, 52a.

The decision below failed to understand the nature of a proposed Development Document. It is not a proposal, but simply the means of providing background data and details with respect to the rulemaking.[16] *American Paper Institute v. EPA*, 660 F.2d 954, 959 n.13 (4th Cir. 1981); *Appalachian Power Co. v. EPA*, 579 F.2d 846, 853 (4th Cir. 1978); *American Iron and Steel Institute v. EPA*, 568 F.2d 284, 291 (3d Cir. 1977).

---

[15] The vice of such a requirement is readily apparent in this case. Here Petitioners, in addressing the six proposed technology options, submitted hundreds of pages of data and 30,000 sampling results. The decision below would have increased Petitioners' burden four-fold. That indeed would be a classic "paper chase."

[16] The final Development Document contains sulfide precipitation data obtained by EPA *after* the rulemaking: "Information contained in this paragraph was added by the Agency after promulgation of the regulations and is not part of the Administrative record." Record 46973. This is somewhat incongruous since the Development Document itself is in the record.

B. The Fourth Circuit Misinterpreted the "Logical Outgrowth" Rule

The decision also erroneously held that sulfide precipitation technology was a "logical outgrowth" of the original proposal; it misconstrues that concept. Logical outgrowth must stem from the Agency's *proposal*, and not from a response to comments or complaints, if a substantial change in a proposed rule without further notice is to be sanctioned. The Agency itself must provide the notice of a regulatory proposal. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 549 (D.C. Cir. 1983). See also *Taylor Diving & Salvage Co., Inc. v. Dept. of Labor*, 599 F.2d 622 (5th Cir. 1979); *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972). It is the Agency's responsibility to provide notice of a proposed rule; comments by other parties do not satisfy that obligation. As stated in *Chocolate Manufacturers Ass'n v. Block*, 755 F.2d at 1104:

> "An agency, however, does not have carte blanche to establish a rule contrary to its original proposal simply because it receives suggestions to alter it during the comment period. An interested party must have been alerted by the notice to the possibility of the changes eventually adopted from the comments."

In this case Petitioners could scarcely have been alerted to any changes in the rule prompted by the comments, since neither the proposal nor the comments even mentioned sulfide precipitation. The decision adopts *in toto* the EPA position on sulfide

precipitation which was developed entirely without public input or scrutiny.[17]

The court below clearly extended the logical outgrowth theory beyond legal limits, relying heavily upon the comments as the nexus to the final proposal. The court noted that the "comments led EPA to reexamine its selections of model technologies and data basis." It also observed that changes can be a " 'logical outgrowth' of the original proposal and the notice and *comments* upon it." (emphasis added). In validating EPA's addition of sulfide precipitation, it referred to the fact that it was "an attempt to respond to industry comments and complaints."[18] App. 15a. It is clear then that the court considered the complaints and comments as the trigger for the final proposal.

The court's failure to order the EPA to provide a further opportunity to comment on sulfide precipitation and its refusal to permit Petitioners to supplement the administrative record compounded the error. Without the benefit of Petitioners' comments on sulfide precipitation the court was in no position to determine whether that technology was simply an

---

[17] For example, the court said: "We do not think it disqualifying that the Ashio plant, for example, uses sulfide precipitation to produce an end-product rather than to clean its wastewater, so long as the process adequately reduces pollutant concentrations in wastewater." App. 17a. For a number of technical and production reasons, Petitioners certainly found it "disqualifying" but were not allowed to alert EPA or the court.

[18] These comments and complaints demonstrated that the six proposed technologies were not appropriate for the specific limits in the regulations. Rather than acknowledge the comments, the Agency rejected all Petitioners' data and invoked a new technology to justify its preconceived limits.

incidental supplement to "lime, settle and filter," as EPA contended; whether it could achieve the prescribed effluent limits; and whether the use of the technology in other industries could be validly transferred to the U.S. nonferrous metals industry.[19] In short, the Court deprived itself of a record upon which to make a reasoned and informed judgment.

The effect of the decision is to impose significant burdens on those who wish to comment on proposed regulations. It allows an agency to fulfill the APA notice requirement merely by including material in the voluminous Development Document or anywhere else in the record. This allows (using the words of the court below) ambushing those who have not addressed all the items described therein. It frustrates and precludes meaningful comments in the rulemaking process. It also increases the costs for those who wish to participate in informal rulemaking proceedings since the entire record becomes subject to comment, regardless of what is specified in the Federal Register notice.

II

THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS

The decision below, in its interpretation of "logical outgrowth," conflicts with those of other circuit courts. As noted *supra*, the court below has deemed that a substantial change in a proposed rule induced by comments or criticisms meets the "logical outgrowth" test.

---

[19] See App. 16a-17a where the court makes specific findings with regard to technical and process matters presented in the EPA brief.

Decisions in the District of Columbia Circuit and even within the Fourth Circuit have reached contrary conclusions. Recently the D.C. Circuit stated that as "a general rule, [an agency] must *itself* provide notice of a regulatory proposal. Having vowed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. This notice necessarily must come—if at all—from the agency." *American Federation of Labor and Congress of Industrial Organizations v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985), citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 549 (emphasis in original). In the instant case, the court blindly approved EPA's promulgation of a substantially new regulation which was not even based on a new comment, but rather on the Agency's internal determination that the six proposed technologies were not appropriate.[20] See App. 70a-73a. It also introduced the element of the Agency's good faith (App. 14a), which is irrelevant to the issue of notice and is not a legal substitute for it.

The decision below also conflicts with the recent Fourth Circuit *Chocolate Manufacturer Ass'n v. Block* decision. 755 F.2d 1098 (4th Cir. 1985). In that case, the agency proposed regulations concerning the sugar content of Federally funded food packages. Flavored milk and its sugar content was not placed in issue by the proposed rule. However, in response to comments, flavored milk was deleted from the program because of its high sugar content.

---

[20] See also *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978) ("the Agency's final conclusions are far from the 'logical outgrowth' of the preceding notice and comment process").

The court there recognized an agency may promulgate a final rule different from the proposal, but when the final rule substantially departs from the proposed rule, the notice is inadequate. It noted at the time of proposal the public could not have had any indication that flavored milk was at issue, and the very detailed and specific information in the preamble to the proposed rule did not address it. In striking down the final rule, the *Chocolate* court specifically addressed the "logical outgrowth" rule (755 F.2d at 1105-1106). The court said it did not feel the petitioner was "fairly treated or that the administrative rulemaking process was well served by the drastic alteration of the rule without an opportunity for CMA to be heard." *Id.* at 1106. The court below did not even attempt to distinguish the *Chocolate* decision, and only cited the case for the general proposition that an agency may promulgate a final rule that differs in some particulars from its proposals.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES R. WALPOLE
EDMUND E. HARVEY
JOANNE M. SALVATORE

CHADBOURNE & PARKE
1101 Vermont Ave., N.W.
Washington, D.C. 20005
(202) 289-3000

Of Counsel:

DOUGLAS E. MCALLISTER
AMERICAN MINING CONGRESS
1920 N Street, N.W.
Washington, D.C. 20036
(202) 861-2800

ROBERT A. EMMETT
REED SMITH SHAW & MCCLAY
1150 Conn. Ave., N.W.
Washington, D.C. 20036
(202) 457-6100
Attorneys for Petitioners